



## Indiana's Public Access Laws

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## Access to Public Records Act

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### The Access to Public Records Act ("APRA")

- Purpose: "Providing persons with the information is an essential function of a representative government and an integral part of the routine duties of public officials and employees, whose duty it is to provide the information."
- The full text of APRA can be found at Ind. Code 5-14-3-1 *et seq.*

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## Access to Public Records Act

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- "Public records" are broadly defined: "any material that is created, received, retained, maintained or filed by or with a public agency." I.C. § 5-14-3-2(n).
- The Indiana Court of Appeals has added to this definition any material created *for or on behalf of* a public agency. *Knightstown Banner v. Town of Knightstown*, 838 N.E.2d 1137 (Ind. Ct. App. 2005).
  - In *Knightstown*, the record in question was a settlement agreement held in a private attorney's office. The settlement agreement was created for the public agency but not physically maintained by the agency.

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## Access to Public Records Act

- "Copy" includes photocopying as well as making a digital copy using a digital camera or a hand-held scanner.
- "Inspect" includes the right to make notes, abstracts and memoranda, or to listen to an audiotape.

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## Access to Public Records Act

- The agency may require a person to submit a request for a public record in writing, or in a form supplied by the agency. I.C. § 5-14-3-3(a).
- The agency shall either make the requested copy or allow the person to make a copy on the agency's equipment or on the person's own equipment.
  - If the requester wants to use personal equipment, the agency has the burden of demonstrating its reason(s) for any refusal

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## Access to Public Records Act

- An agency must make reasonable efforts to provide a copy of electronic data to a person if the medium requested is compatible with the agency's system.
- If a record contains disclosable and nondisclosable information, the agency shall separate the disclosable material and make it available. I.C. § 5-14-3-6.
  - **10-FC-38:** Judge did not violate APRA when he did not permit requester to inspect file containing confidential information because APRA requires public agencies to separate material and maintain confidentiality.

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## Access to Public Records Act

### Electronic Mail

- Under the APRA, a public record is any record, **including electronic media**, created received, retained, maintained, or filed by or with a public agency is a public record.
- Therefore, electronic mail is a public record if it is created, received, retained, maintained, or filed with a public agency, including a governing body.

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## Access to Public Records Act

- Electronic mail must be available for inspection and copying by the governing body unless an exception to disclosure, based on the content of the email, applies.
- Electronic mail must be maintained in accordance with records retention schedules, pursuant to I.C. 5-15.

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## Access to Public Records Act

- Email messages maintained in a personal email account (e.g. Yahoo! account) are generally not public record.
- If the personal email is submitted to the agency, it becomes a public record.
  - Example: A council member prints a personal email message from a neighbor and gives it to a city employee for follow-up.

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## Access to Public Records Act

### Public Agency's Responsibilities

- Respond to requests made in person or via telephone within 24 hours of receipt.
- Respond to mailed, faxed, or e-mailed requests within seven days of receipt.
- Respond in writing to written requests for records; best practice is to respond to all requests in writing.

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## Access to Public Records Act

- Responding is not necessarily producing the record; the PAC's opinions have consistently been that the records should be produced within a **reasonable time**
- PACs have considered factors such as
  - the nature of the requests (whether they are broad or narrow),
  - how old the records are, and
  - whether the records must be reviewed and edited to delete nondisclosable material

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## Access to Public Records Act

- The burden lies with the public agency to show the time period for producing documents is reasonable.
- Suggestions:
  - Communicate with the requester.
  - Provide a production deadline and explain reasoning. If an extension is needed, notify the requester before the deadline.
  - Demonstrate good faith by making portions of a production available when voluminous documents are being reviewed for disclosure.

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## Access to Public Records Act

- Section 7 of the APRA requires a public agency to regulate any material interference with the regular discharge of the functions or duties of the public agency or public employees. I.C. §5-14-3-7(a).
- Section 7 does not operate to otherwise deny a requester's rights under the APRA. I.C. §5-14-3-7(c).

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## Access to Public Records Act

### Denials

- If denying records, state reason for denial with citation to specific authority, and give name and title or position of person responsible for denial. I.C. § 5-14-3-9.
  - Citing unnamed "privacy laws" or referring generally to "HIPAA" is not sufficient; citations must be specific.
- Produce records in reasonable time. Communication with requestor is key.

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## Access to Public Records Act

### Copy Fees

- Local agencies may charge only the fee schedule adopted by the fiscal body of the agency and authorized by I.C. § 5-14-3-8.
- May not exceed the *actual cost* for providing a copy of the public record.
- Actual cost is the cost of the paper and per page cost for use of the equipment.
  - Actual cost cannot include labor or overhead. I.C. § 5-14-3-8(d)(2).

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## Access to Public Records Act

### Copy Fees, cont.

- APRA's general provisions regarding fees are sometimes superseded by a specific statute allowing higher fee.
  - County recorders – I.C. § 36-2-7-10.
  - County clerks and court records – I.C. § 33-37-5-1.
- Agencies may require advance payment.
  - **10-FC-22**: Circuit court clerk agreed to provide requested records via mail upon receipt of copy fees and postage from the requester.

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## Access to Public Records Act

### "Enforcement" Provisions

- A person may file a complaint with the public access counselor alleging a denial of a right under APRA or ODL.
- The PAC sends formal complaint to the agency for response and issues a formal advisory opinion within 30 days.
- A person may file a lawsuit in superior court to compel the agency to produce a record or declare an action void.

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## Access to Public Records Act

- If a person prevails in court and has received an advisory opinion from the PAC prior to going to court, the person *shall* be awarded reasonable attorney's fees, court costs, and other reasonable costs of litigation.
  - Ind. Code § 5-14-3-9(i).

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## Access to Public Records Act

### Recent and Relevant Advisory Opinions

- **08-FC-7:** Requesters cannot rely upon the Open Door Law to demand a meeting with a public official.
- **10-FC-12:** Court of Appeals responded to request with an order for copies assessing a \$1 copy fee. Complainant alleged the \$1 fee was excessive. I.C. § 33-37-5-1.

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## Access to Public Records Act

### Advisory Opinions, cont.

- **10-FC-31:** Investigative records of the Disciplinary Commission exempt from disclosure under Ind. Admission & Discipline Rule 23, § 22(a) and I.C. § 5-14-3-4(a)(8).
- **10-FC-53:** Complainant alleged he was denied access because the notarized portion of a record was not caught by the copy machine. The onus was on the requester to bring that to the attention of the clerk.

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## Access to Public Records Act

### Advisory Opinions, cont.

- **09-FC-35:** Request for bulk records was granted by the Division on Court Administration, but the Division deferred the production of responsive records pending the adoption of a bulk records policy.
  - No violation; deferral was consistent with section 7 of the APRA, which requires public agencies to preserve records, and AR 9, which covers bulk records requests.

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## Access to Public Records Act

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### Advisory Opinions, cont.

- **08-FC-206**: Audio transcripts – Court required to provide copies of audio recordings if possible, but not required to do so in a format that does not exist (i.e., transfer from tape to CD if the court lacks such capability).

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## Open Door Law

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### The Open Door Law (“ODL”)

- Ind. Code § 5-14-1.5-1 *et seq.*
- “[A]ll meetings of the governing bodies of public agencies must be open at all times for the purpose of permitting members of the public to observe and record them.” I.C. § 5-14-1.5-3(a).
- The ODL also requires 48-hour advanced notice of meetings. I.C. § 5-14-1.5-5.

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## Open Door Law

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### What is a Meeting?

- A gathering of a majority of the governing body for the purpose of taking official action upon public business. I.C. § 5-14-1.5-2(c).

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## Open Door Law

### What is NOT a Meeting?

- Any social or chance gatherings not intended to avoid ODL;
- On-site inspections;
- Traveling to and attending meetings of organizations devoted to the betterment of government;
- Caucuses (TIP: avoid official action)
  - See I.C. § 5-14-1.5-2(c).

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## Open Door Law

### What is "Official Action?"

\*\*\*Any one of these items constitutes official action:

- receiving information
- deliberating
- making recommendations
- establishing policy
- making decisions
- taking final action (i.e. voting)

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## Open Door Law

### Serial meetings (ODL § 3.1)

In 2007 the legislature added new language to prohibit serial meetings. All of the following must be present:

- three members but less than a quorum meet (no effect if < 6 members)
- subsequent meetings involve at least 2 members
- sum of all meeting attendees constitutes a quorum
- all meetings held within 7 days
- to take official action on public business

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## Open Door Law

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### Executive Sessions

- I.C. § 5-14-1.5-6.1
- The instances are narrowly construed
- The governing body may not take final action (i.e., vote) in an executive session but may make decisions in the executive session. See *Baker v. Town of Middlebury*, 753 N.E.2d 67 (Ind. Ct. App. 2001).

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## Open Door Law

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### Some Reasons for Executive Sessions

- Discussion of strategy with respect to initiation of litigation or litigation that is pending or has been threatened in writing (ODL § 6.1(b)(2)(B))
- To receive information about and interview prospective employees (ODL § 6.1(b)(5))
- To discuss a job performance evaluation (ODL § 6.1(b)(9))

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## Open Door Law

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### Notice Requirements (ODL § 5)

- Notice requirements apply to all meetings, including executive sessions
- Requirements: date, time and location of meeting 48 hours in advance of meeting
  - 48 hours does not include weekends or holidays
  - TIP: Specific time is required

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## Open Door Law

### Posting or Delivery of Notice

- Notice must be posted at agency's principal office or at meeting place
- The agency must also deliver notice to all news media that deliver by January 1 an annual written request for such notices.
  - The delivery of notice to news media is not "posting" even if the media publish the notice or advertise the meeting
  - Regular meeting notices = 1x/year unless rescheduled

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## Open Door Law

### Executive Session Notice:

- Must contain the same information as for an open meeting, but must also state the subject matter by specific reference to the enumerated instance(s) for which executive sessions may be held.
  - TIP: There is no executive session instance to "discuss personnel matters" or to "meet with the Board's attorney."

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## Open Door Law

### Exception to Notice Requirement for "Administrative Function" Meetings

- The requirements for posting notice do not apply when the executive of a county or the legislative body of a town meets if
  - the meeting is held solely to receive information or recommendations in order to carry out administrative functions, to carry out administrative functions, or confer with staff members on matters relating to the internal management of the unit

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## Open Door Law

### Administrative Function Meetings (cont.)

- These meetings do not include the awarding of contracts, entering into contracts, or any other action creating an obligation on a county or town.
- TIP: The “administrative function” meeting must be public because the notice provision of the ODL is the only provision that does not apply.
  - I.C. § 5-14-1.5-5(f)(2).

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## Open Door Law

### Agenda and Memoranda (ODL § 4)

- The ODL does not require an agency to utilize an agenda.
- If the governing body utilizes an agenda, the agenda must be posted outside the meeting before the meeting begins.
  - The ODL does not provide a specific deadline for posting the agenda.

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## Open Door Law

### Agenda and Memoranda (cont.)

- An agency may deviate from its posted agenda unless a specific statute provides otherwise.
- TIP: A final action adopted by reference to agenda number or item alone is void (e.g. “All in favor of item IV?”)

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## Open Door Law

### Agenda and Memoranda (cont.)

- ODL does not require minutes
- Memoranda must be kept as the meeting progresses and must contain:
  - Date, time and location of meeting
  - Members present and absent
  - The general substance of all matters, proposed, discussed, or decided
  - A record of all votes taken, by individual members if there is a roll call

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## Open Door Law

### Agenda and Memoranda (cont.)

- The memoranda are to be available within a reasonable period of time after the meeting.
- The minutes, if any, are to be open for inspection and copying.
- TIP: Draft minutes of a public meeting are subject to disclosure despite not being in final form or adopted by the governing body. (*Formal Opinion 98-FC-8*)

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## Open Door Law

### Memoranda Requirements for Executive Sessions

- Same requirements as for meetings and the memoranda and minutes must identify the subject matter considered by specific reference to the enumerated instance or instances for which public notice was given.
- The memoranda and minutes must certify no other matter was discussed.

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## Open Door Law

- A right of the public to record meetings, found at I.C. § 5-14-1.5-3(a) *includes* the right to record the meeting (audio or video). *Berry v. Peoples Broadcasting Corp.*, 547 N.E.2d 231 (Ind. 1989).
- TIP: A governing body may place reasonable restrictions on the use of such equipment, but may not ban the use of audio or video recorders.

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## Open Door Law

- Teleconferencing or videoconferencing of meetings
  - Generally, a member of a governing body who is not physically present but communicates by electronic or telephonic means may not vote and may not be counted present
  - Some specific statutes allow for teleconferencing or videoconferencing

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## Open Door Law

### Is Electronic Mail a Meeting?

- Indiana courts have not addressed the issue, but the Virginia high court ruled that email communications did not constitute a meeting. *Beck v. Shelton*, 593 S.E.2d 195 (Va. 2004) (no simultaneity)
- Previous PACs have opined that email is not a "meeting" under the ODL\*\*\*
  - \*\*\*TIP: Keep in mind the APRA

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# Office of the Public Access Counselor

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the *Handbook on Indiana's Public Access  
Laws*, advisory opinions, and other  
resources.

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